UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 13023.

CIVIL.

MAE HUFFMAN, APPELLANT,

VS.

HOME OWNERS LOAN CORPORATION, APPELLEE.

PETITION FOR REHEARING.

Now comes appellant and petitions the court to grant her a rehearing herein because of material matters of law and fact overlooked by the court as shown by its opinion, to-wit:

The trial court and this court wrongfully refused to follow and apply the law of Missouri as expressed in the last and controlling decisions of Missouri appellate courts in respect to the duty of a landlord who is "put on inquiry" as to the existence of dangerous conditions before letting premises. Both courts refused to follow and apply the Missouri law as expressed in *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11; *Myers* v. *Russell*, 124 Mo. App. 317, 101 S. W. 606; *Mahnken* v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d

797, and other similar cases cited in appellant's brief under Argument I.

The court, in deciding the "concealed defect" issue against appellant at the bottom of page 6 of the opinion said:

> "It (trial court) manifestly believed that plaintiff had not proved that defendant knew at the time of the letting of the defect that caused the accident."

And on page 7 of the opinion, the court said:

> "But the issue as to alleged fact of defendant's knowledge of the defect at the time of the letting was submitted to the court as trier of the facts, and its determination of the fact issue against the plaintiff is binding on this court unless clearly erroneous."

In short, since Judge Otis found that defendant did not *know* of the *defect* before the letting, this court is bound by that finding unless it is clearly erroneous.

And on page 7: "we find no evidence in the record to justify reversal of the trial court's determination that plaintiff failed to prove her charge that the defect in the fourth tread that caused the accident was known to defendant and concealed from plaintiff."

In other words, not only does this court hold that Judge Otis found that defendant did not know of the defect that caused the accident, but this court finds "no evidence in the record to justify reversal of the trial court's determination * * *," which means that this court has read and considered the evidence on that subject.

Appellant contends that Judge Otis did not find that defendant did not know of the defect, but on the contrary, he did find that defendant knew of the defect, because he said the defendant was not liable because "defendant

owed no duty to plaintiff or his tenant to make an inspection of the stairway * * * and defendant did not undertake to inspect or repair the fourth tread" (R. 32).

If Judge Otis' Findings of Fact 12 and 13 can be construed to mean that plaintiff had failed to prove that the defendant knew of the defect, the findings are clearly erroneous under the undisputed testimony and the judgment is contrary to the last and controlling decisions of the State of Missouri, *supra*.

Judge Otis found that the defect consisted of: (a) The tread "was (and long had been) longitudinally split in two parts." (This was an obvious defect and so found to be by this court in its previous opinion.) (b) The tread had—by reason of the split and of the fact that one end "was held to the underlying horse by a single—and loosened—nail—a freedom of movement up and down about the fulcrum made by the connection of nail and horse." (This, under the construction placed by this court upon the finding, is the concealed defect and danger.)

In other words, the tread was longitudinally split in two parts and was not properly nailed so that the front part of the tread moved up and down. Judge Otis said:

> "By reason of these matters the tread was not reasonably safe."

The latter reason, movement of the tread, was a finding *additional* to those found by Judge Reeves.

Judge Otis then found in Finding of Fact 13 that:

> "Any reasonable inspection of the stairway by a *skilled artisan* would have disclosed the longitudinal split in the fourth tread, and would have put him on inquiry concerning its safety. Any reasonably careful inspection would have disclosed that the fourth tread was not reasonably safe."

This court on first appeal, Judge Gardner speaking, said:

> "The crack was as apparent to Sweeney as it was to the inspector."

The longitudinal split was *obvious* to anybody. It was obvious to the plaintiff but the *danger* was not obvious to her, else she would have been held guilty of contributory negligence. (See Judge Otis' Finding of Fact No. 11.) Butterworth admitted that he made "an examination of the treads in the stairway" (R. 73); saw cracks and splits in the stairway and made the examination "to see whether it (the stairway) was in sound condition" (R. 73); saw "there was a number of treads in the stairway that was split" (R. 73); took "the size and length of the treads" (R. 73); he "made an inspection of the basement stairs before Hansen began any work on it" (R. 73).

This undisputed testimony of Butterworth, defendant's Reconditioning Inspector, proves without question that he saw the longitudinal split in the fourth tread which was obvious to anybody. An examination of photograph, plaintiff's Exhibit 5, demonstrates this.

So it is admitted, or proved conclusively, that Butterworth saw the split fourth tread before the letting. Under Finding of Fact 13 his knowledge of this fact "put him on inquiry concerning its safety." He "looked at the structural parts, all parts of the steps" (R. 73) and knew the tread had an overhang of 1 1/2 inches. Let us concede for the sake of argument that Butterworth did not know at the time he made his inspection and examination of the stairway and treads anything about how this tread was nailed and did not know that there was a "freedom of movement up and down" of the front half of this tread. Let us say, for argument, that all he saw was the longitudinal split, then under Finding of Fact 13 and the law

of Missouri (*Meade* v. *Montrose et al., supra*) plaintiff is entitled to judgment.

Since Butterworth, a skilled artisan, saw the split and the trial court found as a fact that knowledge of the split "*would have put him on inquiry concerning its safety*" a duty *then* arose to "pursue" the inquiry to find out the "danger." And the defendant thus being "put on inquiry concerning its safety" is liable if it failed to "mention the matter to his tenant" before letting.

Under the law of Missouri it is not necessary that a landlord must *know the danger concealed in this tread.* He is liable if he is aware of any condition which "puts him on inquiry concerning its safety," and he fails to exercise reasonable diligence to satisfy himself of the non-existence of the danger about which he is "put on inquiry," and fails to warn his prospective tenant thereof.

Before the defendant let the premises to Sweeney the defendant owed no legal duty to hunt for concealed defects, that is, those defects that are not easily discoverable by a tenant, but if the landlord sees something that "puts him on inquiry," or suggests to him, or gives him reason to suspect the existence of danger, then the landlord must exercise reasonable diligence to satisfy himself of the non-existence of danger before leasing without mentioning the matter to his tenant, else he will be liable.

This court has failed to recognize the difference under Missouri law between knowledge of defects and knowledge of any fact that puts a landlord on inquiry concerning safety. Under Missouri law "reason to suspect" danger is sufficient to impose liability. "Knowledge of facts from which he ought to have known, or will be presumed to have known, of them (concealed defects or dangers)" is sufficient to impose liability upon

a landlord who lets premises with such presumptive knowledge.

The law of Missouri is clearly shown in the Missouri cases cited in appellant's brief, but in none more clearly than in *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11, where the court said:

> "If there is some hidden defect known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and if he fails to do so, he is liable to the tenant for injuries arising therefrom * * * But in order to make the landlord liable for such hidden defects under such exception, it must be shown that they were known to him, or that they were those the existence of which he had reasonable grounds to suspect (1 Tiffany on L. & T. 651-2). The statement contained in this last clause does not mean that if the landlord had no reason to suspect concealed defects or dangers, nevertheless he must make an examination in an effort to discover them, or else he will be held liable. *It only means that if he had reason to suspect their existence, and did not exercise reasonable diligence to satisfy himself of their non-existence before leasing without mentioning the matter to his tenant, he will be liable* (1 Tiffany on L. & T. 567). So that the proper statement of the rule is that the landlord will not be liable for concealed defects or dangerous conditions existing at the time of the demise unless he knew of the defects or *had knowledge of facts from which he ought to have known, or will be presumed to have known*, of them" (Italics ours).

It is evident that this court has misunderstood the law of Missouri or has refused to follow and apply it.

If appellant were to concede, which she does not, that everything which this court says upon this issue is

sound law, we still say that appellant is entitled to judgment under the law of Missouri as expressed in *Meade* v. *Montrose et al.*, because: (a) the longitudinal split was obvious and Judge Otis found that the split put the defendant on inquiry concerning the safety of the tread.

Respondent in its Brief pages 12 and 13, contends that the longitudinal split was obvious. It says: "Anyone looking at it could see it was split"; "there is no question but what the split was discoverable as this court held in its former opinion." And respondent argues that since the split was obvious "it was not in any event a concealed defect." Of course, the split was not a concealed defect, but that fact or conclusion is beside the point. The trial court found that knowledge of the split "by a skilled artisan (meaning Butterworth) * * * would have put him on inquiry concerning its safety."

It is that "knowledge of facts from which he ought to have known, or will be presumed to have known, of them" that created a duty to "exercise reasonable diligence to satisfy himself of their non-existence before leaving without mentioning the matter to his tenant."

The phrase "satisfying himself of their non-existence" as used in the *Meade* v. *Montrose* case, applied to the facts of this cause, does not mean the existence of the longitudinal split (because that existed and was obvious) but it means the non-existence of a concealed danger which knowledge of the existence of the split "put him (Butterworth) on inquiry concerning its safety."

This court holds that plaintiff is not entitled to recover because "plaintiff had not proved that defendant knew, at the time of the letting, of the defect that caused the injury," the trial court having so found, and this court after examining the evidence so finding also. The

trial court, and this court, in so holding, deny to plaintiff her right to recover if she proved that defendant "had knowledge of facts from which he (it) ought to have known, or will be presumed to have known of them" (dangerous conditions). The trial court found as a fact that knowledge by Butterworth of the longitudinal split (and he had such knowledge) "would have put him on inquiry concerning its safety." He had such knowledge and was put on inquiry as to the safety of the tread; being put upon inquiry concerning its safety he had "reason to suspect" the existence of danger; he was required to "exercise reasonable diligence to satisfy himself of their non-existence" (dangerous conditions), not by reason of any primary duty upon defendant to hunt for concealed defects, but because, having knowledge of facts from which he ought to have known of danger it must exercise reasonable diligence to satisfy itself that there is no danger.

This court applied *one* element of the applicable Missouri law—knowledge of concealed defects—but refused to apply the other and here controlling element—knowledge of facts that put it on inquiry concerning the safety of the tread.

The law of notice as expressed in the *Meade* v. *Montrose case, supra,* is similarly stated in *Selzer* v. *Baker,* 54 N. Y. S. 2d 666, as follows:

> "Whatever is notice enough to excite attention and put a party on guard and call for inquiry, is notice of everything to which such inquiry might have led."
>
> "When person has sufficient information to lead him to fact, he is deemed conversant with it." *Dow* v. *Worley,* 256 Pac. 56.
>
> "Notice sufficient to put reasonable person on guard and call for inquiry constitutes notice of ev-

erything to which inquiry might have led." *Trosper* v. *McKee*, 4 Pac. 2d 755.

"Knowledge of facts or circumstances putting person of ordinary prudence upon inquiry is knowledge of such facts as reasonable inquiry would disclose." *Shell Petroleum Co.* v. *Corn*, 54 F. 2d 766.

"Notice of facts inciting prudent person to inquiry is notice of facts which reasonably diligent inquiry would develop." *In re Bresman*, 45 F. 2d 193.

Judge Otis did *not* find that Butterworth did not have "knowledge of facts from which he ought to have known, or will be presumed to have knowledge" of the "dangerous condition." The fact is that he found by Finding of Fact 13 (as under the undisputed evidence he was required to find) that Butterworth did have knowledge of "the longitudinal split in the fourth tread," and he specifically found as a fact that that knowledge "would have put him on inquiry concerning its safety." The fact that Butterworth did or did not actually know when he saw the split, how the front half of the tread was nailed or did not know that there was a movement of the tread up and down is wholly irrelevant to the duty that arose when he saw the split tread. Knowledge of that split put him on inquiry as to the safety of the tread and he was then required to exercise reasonable care to find out how the tread was supported and what, if any, danger existed by reason of the split.

The trial court having found as a fact that he was put on "inquiry concerning its safety" it was up to Butterworth and this defendant to either find out and remedy the danger or inform the tenant thereof, and negligently failing so to do, it became liable.

This court in deciding the "negligent repair" issue refused to follow and apply the law of Missouri as expressed in the last controlling decision of the Supreme

Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, decided after the former opinion of this court in *Home Owners Loan Corporation* v. *Huffman*, 124 F. 2d 864, and in *Vollrath* v. *Stevens*, 202 S. W. 283.

The sum and substance of this court's opinion on this issue is that since "the defective fourth tread of the stairway which caused plaintiff's injury had remained untouched by the landlord from the time of renting the premises to the time of injury" there can be no liability.

The undisputed evidence, much of it coming from defendant's Reconditioning Inspector Butterworth, was that the defendant made a thorough examination of the stairway, including treads and "all structural parts" (R. 73, 74, 75). Butterworth was asked by the court:

> "The Court: What was your purpose in examining the stairway?" and he answered:
> "A. I was to see whether it was in sound condition" (R. 73).

Of course, the defendant had to inspect the stairway before it could decide what repairs were needed. It did inspect the whole stairway but negligently (we urge) decided to fix only the board in the bottom landing.

This court holds that even though the defendant left unrepaired what should have been repaired, the defendant is not liable because it left the fourth tread "untouched," and that liability can only flow from "touching" or doing some work on or about the fourth tread. That conclusion or holding in the *Davis* v. *Cities Service Oil Co.* case is exactly what the Missouri Supreme Court in the *Bartlett* v. *Taylor* case held was not the law of Missouri; and caused the court to overrule the Davis case. The fact that in the Bartlett case the defendant did "touch" the instrumentality involved is of no ma-

terial consequence. The Supreme Court overruled the *principle* underlying the Davis case and underlying the former opinion of this court. The principle announced in the Bartlett case had long been the law of Missouri. It was nothing new.

In *Vollrath* v. *Stevens,* 202 S. W. 283, 286, often cited, the Court said:

> "However, when defendant took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not non-feasance."

That the defendant here decided to recondition the house throughout is undisputed. Its property manager and Reconditioning Supervisor, Mr. Hale, had looked over the house and decided it should be thoroughly done over, and Butterworth, the Reconditioning Inspector, then made a thorough inspection of the whole house, including this stairway, "to see whether it was in sound condition" (R. 73). So it is plain, to use the language of the Vollrath case, the defendant "took upon itself the burden to use ordinary care to repair the premises, including this stairway." So if in so doing it "failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe (such as a split tread in a stairway that was obvious) it was guilty of misfeasance, and not non-feasance" (Parentheses ours).

All of which means that the holding of this court that a landlord must "touch" a defective part before it is liable is contrary to the law of Missouri.

If this court's analysis and appraisal of the Bartlett case is correct, then it follows that the Missouri Supreme Court in that case did a futile and meaningless thing in overruling the Davis case; when it said that the doctrine "that the repairs must 'make the land more dangerous for use' * * * should not be adopted or applied" it was uttering a meaningless phrase. Surely the following language approved by the Supreme Court in the Bartlett case should control this court, to-wit:

> "There is a suggestion that to make the landlord liable, the negligent repairs must have aggravated the defect, so that what was wrong before became more dangerous than ever. We cannot yield assent to this restriction of the field of duty. The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right."

Surely the "touch" doctrine is not the law of Missouri. Under the holding of this court if it be admitted that Butterworth examined the stairway "to see whether it was in sound condition" (R. 73) and examined the fourth tread, saw the split, overhang, improper nailing, split corner of the horse, and knew all the facts about the tread shown in evidence, and decided to do nothing about the tread, then no liability could arise because he did not "touch" the tread or perform any repairs at all; or suppose Butterworth knew all aforesaid facts and told one of his carpenters to put a "chock" under the tread so it wouldn't tip and the carpenter did nothing about it, then under the opinion of this court no liability could arise under this issue, because "so far as the fourth tread was concerned, it was in exactly the same condition at the time of the accident as it was before * * *." If that is the law

what becomes of the doctrine of the Bartlett and Vollrath cases? Under what circumstances could a landlord who decides to recondition a house including a stairway and examines the stairway "to see whether it is in sound condition" possibly be liable for negligently leaving "what was wrong, still wrong"? If the answer to that question be that the landlord must be shown to have done some work about the tread, before he can be held liable, we ask: "Must it be shown that such work was *negligently* done?" that is, must it be proved that such negligence made the danger worse?

If that is the conclusion to which we are driven, then it follows that such conclusion is what the Supreme Court in the Bartlett and Vollrath cases has held is *not* the law of Missouri.

To make the matter very simple and plain, let us assume, then, that Butterworth seeing the said condition of the tread, drove another 8-penny nail in the tread which did not penetrate or go into the horse. Of course such ineffective nail did not increase the danger and such nailing could not be said to have "proximately" caused the injuries, as the danger would be exactly the same before he put the nail in as it was afterward.

If this court means by "touching," any work done on the tread that *increased* the danger, then the case is decided under the Davis theory, which has been overruled and never was the law of Missouri. If the work done did *not increase* the danger, then this court could invoke the doctrine of proximate cause, that is, what defendant did did not cause the injuries.

If it is said there was no proof that defendant "entered upon the performance" of repairing the fourth tread; and hence no liability, the answer is that the uncontradicted evidence is that Butterworth did examine all the treads

"to see whether it (the stairway) was in sound condition" (R. 73).

It is respectfully submitted that this court should grant a re-hearing herein.

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Certificate of Counsel.

The undersigned counsel for appellant hereby certify that this Petition for Rehearing is filed in good faith and believed to be meritorious.

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CONCLUSION.

The affirmance of defendant's judgment is based upon erroneous constructions of Missouri law, contrary to the controlling decisions of the Supreme Court of Missouri, and the Courts of Appeals, fortified by erroneous disregard by the Circuit Court of Appeals of the Findings of Fact 12 and 13 of the District Court upon substantial evidence, in violation of Rule 52 (a). In effect and result, the Circuit Court of Appeals has assumed the prerogative of the Supreme Court of Missouri to change the Missouri law, and the prerogative of the District Court to find and determine the facts upon substantial evidence. The petitioner respectfully prays that the writ of *certiorari* be granted, that the judgment of the Circuit Court of Appeals be reversed and that the case be ordered remanded to the District Court for the sole purpose of determining the amount of plaintiff's damages.

Respectfully submitted,

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